



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 8, 2020

Roberto M. Contreras
Assistant City Attorney
City of Carlsbad
1200 Carlsbad Village Drive
Carlsbad, Ca 92008

Re: Your Request for Advice
Our File No. A-20-119

Dear Mr. Contreras:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the San Diego County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the City of Carlsbad from entering a contract with an independent contractor for roof replacement services on a project where the independent contractor provided roof assessment services under a previous contract for the same project?

CONCLUSION

No. Section 1090 does not prohibit the City from entering the subsequent contract with the independent contractor for roof replacement services because the independent contractor is not subject to Section 1090 as a result of the initial contract.

¹ All statutory references are to the Government Code, unless otherwise indicated.

FACTS AS PRESENTED BY REQUESTER

You are an Assistant City Attorney with the City of Carlsbad. The City intends to publish a Request for Proposals for a capital improvement project at the Leo Carrillo Ranch Historic Park, which is a 27-acre historic park listed in the National Register of Historic Places and a California Historical Landmark. The City owns the park and is responsible for ongoing maintenance of all structures at the park.

On October 15, 2019, the City executed an agreement with Page & Turnbull (“P&T”) for roof assessment services at the park. The scope of work involved roof assessment services and cost estimates to repair eight historic buildings as requested by the City in the Request for Proposal. Specifically, P&T provided the City project administration and management services; review of previous as-built drawings and reports; preparation of baseline drawings; multi-day site visit to assess conditions; repair recommendations; general repair costs (prepared by P&T’s subconsultant); and preparation of draft and final reports. The purpose of providing these services was to identify and prioritize necessary repairs which P&T documented in a condition assessment report.

The agreement provided a six-month term and total compensation not to exceed \$45,395.00. Section 6 of the Agreement identifies P&T as an “independent contractor and in pursuit of the Contractor’s independent calling, and not as an employee of City.”

The City plans to issue an RFP in the near future for historical roof replacement at the Park. P&T neither participated in nor advised the City on any matter regarding the forthcoming RFP. P&T did not influence or advise the City on how to advertise the work to prospective bidders, nor did P&T advise the City on roofing design or construction contracts.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

Independent contractors

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291 [“statutes

prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] ... [¶] A person merely in an advisory position to a city is affected by the conflicts of interest rule”.)

Importantly, however, the California Supreme Court recently clarified the standard used to determine whether an independent contractor is subject to Section 1090 in the first instance. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230.) There, it held that Section 1090’s reference to “officers” applies to “outside advisors [independent contractors, including corporate consultants] with responsibilities for public contracting similar to those belonging to formal officers.” (*Id.* at p. 237.) In other words, Section 1090 does not cover all independent contractors – only those who are “entrusted with ‘transact[ing] on behalf of the Government.’” (*Id.* at p. 240 quoting *Stigall, supra*, 58 Cal.2d at p. 570.)

The determinative question in this matter is whether the initial contract between the City and P&T provided P&T with responsibilities or duties for public contracting on behalf of the City such that it would be covered by Section 1090. We find that it did not. According to the facts, P&T was required under the contract to provide roof assessment services and cost estimates to repair eight historic buildings, including the review of previous as-built drawings and reports, preparation of baseline drawings, repair recommendations and costs, and preparation of associated reports. There are no facts suggesting P&T had any responsibilities for contracting on behalf of the City under the initial contract, and P&T is therefore not subject to Section 1090 as a result of that contract.

Accordingly, Section 1090 does not prohibit the City from entering into a subsequent contract with P&T for the roof replacement services at the park.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

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